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IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,

Petitioner,

—v.—

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AND TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution. The New York Civil Liberties Union is one of its statewide affiliates. For more than eight decades, the ACLU has steadfastly adhered to the position that our nation's fundamental commitment to civil liberties cannot be forsaken in periods of national crisis. In support of that position, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. *See, e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Hirabayashi v. United States*, 320 U.S. 81 (1943). The ACLU has also opposed arbitrary and indefinite detention as a violation of due process in many different contexts. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678 (2001). The proper resolution of the issues raised in this case therefore is critically important to the ACLU and its members.

Trial Lawyers for Public Justice (TLPJ) is a national public interest law firm dedicated to using trial lawyers' skills and approaches to create a more just society. Through precedent-setting litigation, TLPJ prosecutes cases throughout the country designed to enhance consumer and victims' rights, environmental protection, civil rights and liberties, workers' rights, our civil justice system, and the protection of the poor and powerless. TLPJ appears as *amicus curiae* in this case because it is committed to ensuring that the United States of America continues to provide – and

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[1] Counsel for *amici* have lodged with the Clerk letters of consent to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

stand throughout the world as a beacon for – access to justice.

STATEMENT OF THE CASE

Respondent Jose Padilla has been detained for nearly two years. For most of that time, he has been held *incommunicado* in a military brig. The sole basis of his detention is the President's unilateral declaration that he is an "enemy combatant." According to Petitioner, this designation allows the government to impose indefinite, potentially lifelong detention without ever allowing the detainee to challenge the allegations against him.

On May 8, 2002, Jose Padilla flew, unarmed, on a commercial airline from Pakistan, via Switzerland, to Chicago's O'Hare International Airport. Pet. App. 4a. When he landed, he was arrested by FBI agents executing a material witness arrest warrant issued by the Chief Judge of the United States District Court for the Southern District of New York. *Id.*

Padilla was transferred to New York, where he was held as a material witness in connection with a grand jury investigation of the terrorist attacks of September 11, 2001. He was housed in the Metropolitan Correctional Center's maximum security wing, under the control of the Bureau of Prisons and the United States Marshal Service. *Id.*

On Sunday, June 9, 2002, two days before a scheduled conference on Padilla's motion to vacate the material witness arrest warrant, the government informed the district court *ex parte* that the President had issued an order naming Padilla an "enemy combatant" and transferring his custody to the Secretary of Defense. Pet. App. 5a. The district court vacated the warrant that day and the Department of Defense, without notice to counsel, immediately seized Padilla and transported him to a high

security military brig in South Carolina. *Id.* For the next twenty months, the government denied Padilla all access to counsel or any other nonmilitary personnel.[2] *Id.*

Padilla's appointed counsel immediately filed a habeas corpus petition on his behalf. J.A. 46-58. In an opinion dated December 18, 2003, the Second Circuit directed the district court to issue the writ. Pet. App. 55a-56a. As a threshold matter, the court held that the Secretary of Defense had been appropriately named as a respondent and was properly subject to the district court's jurisdiction. Pet. App. 21a-26a.[3] On the merits, the majority found that the President lacked inherent authority to order Padilla's military detention. Pet. App. 26a-43a. In addition, the majority determined that Padilla's detention was barred by 18 U.S.C. § 4001(a), which prohibits the detention of a United States citizen unless authorized by an Act of Congress. Pet. App. 43a-50a. The majority then rejected Petitioner's claim that the necessary authorization could be found in either the congressional Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), or 10 U.S.C. § 956(5),

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[2] On December 4, 2002, after Padilla had already been in military custody for six months, the District Court ordered the government to allow Padilla and his counsel to meet, subject to government-imposed conditions. Pet. App. 154a-155a. Rather than comply with this order, the government asked the district court to reconsider, resting in part on its assertion that any contact with counsel or family members would undermine the relationship of "dependency and trust" that the government sought to establish with Padilla as part of his interrogation. J.A. 86. When the district court was not persuaded to change its ruling, the government filed an interlocutory appeal. Two months after the Second Circuit issued its decision, and twenty months after Padilla was initially detained by the military, the Department of Defense announced "as a matter of discretion and military authority" that it would permit monitored meetings between Padilla and his counsel. U.S. Dept. of Defense News Release, *Padilla Allowed Access to Lawyer* (Feb. 11, 2004), *available at* http://www.defenselink.mil/cgi-bin/dlprint.cgi?http://www.defenselink.mil/releases/2004/nr20040211-0341.html.

[3] Those jurisdictional issues are not addressed in this brief.

an appropriations provision that makes no specific reference to "enemy combatants." Pet. App. 50a-55a. As a result, the court ruled that Padilla must be released from military custody but that the government could transfer him to civilian authorities to be held for criminal prosecution or, if appropriate, as a material witness. Pet. App. 55a-56a.

SUMMARY OF ARGUMENT

Petitioner's contention that Padilla can be indefinitely confined in a military brig without either congressional authorization or meaningful judicial review supposes a very different government than the Framers established. *See* The Federalist No. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

The absence of congressional authorization is sufficient to dispose of this case and affirm the decision below. We will not repeat those arguments here, which are set forth in the Second Circuit's opinion. But even if congressionally authorized, Padilla's detention violates two other constitutional principles that neither Congress nor the Executive is free to ignore.

The first principle is so basic that the need to restate it only highlights the radical nature of the government's position in this case: individuals in this country cannot be imprisoned without due process of law. The rule against arbitrary detention traces back to the Magna Carta. As Justice Cardozo explained in one of this Court's most important opinions addressing the contours of constitutional liberty: "Fundamental . . . in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (citations omitted). Here, the government has publicly accused Padilla of serious wrongdoing. If it wishes to detain him on that basis, he is entitled to be formally charged and tried before a jury with the assistance of counsel. So far, the government has provided none of these fundamental rights, although Padilla has now been detained for almost two years.

The second principle, and the focus of this brief, involves the supremacy of civilian authority in our constitutional democracy. This principle also has deep historical roots. In listing their grievances against the English Crown, the Founding Fathers expressly criticized conduct "render[ing] the Military independent of and superior to the Civil power." The Declaration of Independence para. 14 (U.S. 1776). Reflecting that grave concern, the Supreme Court held in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), that the government may not subject civilians to military trials, even in wartime, if the civilian courts are open and functioning.

The government does not and cannot contend that its action in this case has respected those principles. Instead, it insists that it is entitled to disregard these important constitutional values because we are engaged in a war on terrorism. It does so by claiming that the force of *Milligan* has been eclipsed by *Ex parte Quirin*, 317 U.S. 1 (1942), and that *Quirin* provides the government with all of the authority it needs to justify Padilla's indefinite military detention.

Quirin, however, does not support the government's position in this case. By its express terms, *Quirin's* holding was limited to enemy soldiers who forfeited their privileged status by violating the law of war and were therefore subject to military trial and punishment as unlawful combatants. In distinguishing *Milligan,* the government's brief in *Quirin* specifically relied on the distinction between soldiers and civilians to justify its assertion of military jurisdiction. Like

Milligan, however, Padilla is a civilian and not a combatant in any legally meaningful sense. As this Court reasoned in *Milligan*, if "he cannot enjoy the immunities attaching to the character of [a combatant], how can he be subject to their pains and penalties[.]" *Milligan*, 71 U.S. at 131. Moreover, unlike the *Quirin* petitioners, who were convicted by a congressionally authorized military tribunal after an adversary proceeding, Padilla has never been charged or tried in any forum.

In short, *Quirin* was a narrow decision that can and should be confined to its facts, while *Milligan*'s assertion of civilian over military authority established a core principle of constitutional law that this Court has repeatedly reaffirmed. It is *Milligan*, not *Quirin*, that is controlling here. Applying *Milligan* to these facts, it is clear that Padilla's detention is fundamentally at odds with basic values that have defined our nation since its founding.

ARGUMENT

PADILLA'S INDEFINITE DETENTION BY MILITARY AUTHORITIES VIOLATES CORE CONSTITUTIONAL PRINCIPLES

The "tradition of keeping military power subservient to civilian authority" was strong in the minds of the Framers. *Reid v. Covert*, 354 U.S. 1, 40 (1957) (plurality); *see id.* at 23. They were aware that military leaders had overthrown ancient governments, *id.* at 24, and they were familiar with the events that transpired in seventeenth century England, when "our British ancestors took political action against aggressive military rule." *Duncan v. Kahanamoku*, 327 U.S. 304, 320 (1946).[4] This history led Lord Chief Justice Hale

[4] As the Court explained in *Duncan*, "[w]hen James I and Charles I authorized martial law for purposes of speedily punishing all types of crimes committed by civilians the protest led to the historic Petition of Right which in uncompromising terms objected to this arbitrary procedure and prayed that it be stopped and never repeated." 327 U.S. at 320 (footnotes omitted). Further abuse of military authority came under James II, which ultimately led to the ascension of William and Mary, whose rule was conditioned upon adherence to a Bill of Rights that protected the right to jury trial. *Reid*, 354 U.S. at 25-26. More detailed explication of this history is provided in both *Duncan*, 327 U.S. at 319-22, and *Reid*, 354 U.S. at 23-30.

and Sir William Blackstone – men who strongly influenced the Framers – to express sharp hostility to any expansion of the military's jurisdiction. *Reid*, 354 U.S. at 26.[5]

Our nations' Founders themselves experienced military interference with civilian courts, leading to their grievance that "the King had endeavored to render the military superior to the civil power." *Duncan*, 327 U.S. at 320; *accord* The Declaration of Independence para. 14 (U.S. 1776); *see Reid*, 354 U.S. at 27-29. Distrusting "military justice dispensed by a commander unchecked by the civil power in proceedings so summary as to be lawless," *Loving v. United States*, 517 U.S. 748, 765 (1996), they drafted the Constitution to reflect their grave "fear and mistrust of military power" by rendering that power "subordinate to civil authority." *Reid*, 354 U.S. at 29, 30.

[5] In criticizing the use of court martials for the prosecution of soldiers' peacetime violations of domestic criminal laws, Blackstone wrote:

> For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land.

I William Blackstone, Commentaries 413, *quoted in Reid*, 354 U.S. at 26-27; *see also* Matthew Hale, *History and Analysis of the Common Law of England* 40-41 (1st ed. 1713), *quoted in Reid*, 354 U.S. at 27 n.48.

The government's willingness now to blur the lines between civilian and military authority disregards the wisdom, experience, and intent of the Framers and the commands of the Constitution. Even during the most trying times facing our nation, including a bloody civil war, the Court has held fast to the foundational principle that the military not be allowed to usurp civilian authority and subjugate the rule of law. The challenges presently facing our country do not justify turning our back on this important tradition.

A. *Milligan* Continues to Stand for the Constitutional Primacy of Civilian Authority

Milligan arose during the Civil War, when Southern sympathizers in Indiana formed "a powerful secret association, composed of citizens and others . . . under military organization." 71 U.S. at 140 (Chase, C.J., concurring). The government alleged that this group conspired to engage in "insurrection, the liberation of the prisoners of war . . . , the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government." *Id.* Milligan, thought to be a high-ranking member of this paramilitary organization, was arrested by military officers and charged with "conspiracy against the Government of the United States," "affording aid and comfort to rebels against the authority of the United States," "inciting insurrection," "disloyal practices," and "violation of the laws of war." *Id.* at 6-7; *see* William H. Rehnquist, *All the Laws But One* 84 (1998). Although not a member of either the Union or Confederate army, Milligan was tried, convicted and sentenced to death by a military commission. He then filed a habeas corpus petition seeking to be "delivered from military custody and imprisonment, and if found probably guilty of any offence, to be turned over to the proper tribunal for inquiry and punishment; or, if not found thus probably guilty to be discharged altogether." 71 U.S. at 135 (Chase, C.J., concurring).

Presaging the argument it makes today, the government contended in *Milligan* that the unprecedented times then facing the nation – when "almost one-half of its citizens undertook . . . to over-throw the government, and where coward sympathizers, not daring to join them, plotted in the security given by the protecting arms of the other half to aid such rebellion and treason" – both demanded and justified an unprecedented exercise of executive power. *Id.* at 88 (argument of Mr. Butler for the United States). Because the very survival of the nation was at stake, the government argued, the President's powers during the war "must be without limit." *Id.* at 18 ("He is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration.").

Despite the government's plea, the Court held that the military lacked jurisdiction to try Milligan and that he was entitled to be discharged. *Id.* at 121-22, 131. The Court rejected the assertion that "in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power . . . to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will* . . . ." *Id.* at 124. The Court cautioned that "[m]artial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power' . . . . Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish." *Id.* at 124-25.

To the claim that military "jurisdiction is complete under the 'laws and usages of war,'" a claim resurrected here by the government, the Court replied:

> It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.

Id. at 121; *see id.* at 121-22 ("[N]o usage of war could sanction a military trial [where the courts are open] for any offence whatever of a citizen in civil life, in nowise connected with the military service."). The majority made clear that the Constitution allowed neither the President nor Congress to authorize the military to assume what was properly a judicial function. *See id.*[6]

[6] The concurring Justices in *Milligan* agreed that the military did not have jurisdiction to try Milligan and that he was entitled to be discharged. 71 U.S. at 132-35 (Chase, C.J., concurring). To reach that conclusion, they focused on the act that had authorized limited suspension of the writ of habeas corpus. The act had required that persons held under the President's authority, other than as prisoners of war, were to be referred by list to the judges of the district and circuit courts and, if the grand jury terminated its session without proceeding against a prisoner by indictment or otherwise, a judge was to order the prisoner's discharge. *Id.* at 133. Discharge was also required for persons whose names were not listed and referred within twenty days after the detained citizen's arrest. *Id.* at 134. The concurring Justices found that Milligan's discharge was required under the terms of the act, for the requisite list had not been furnished and no indictment had been returned against him though more than twenty days had elapsed and the grand jury had closed its session. *Id.*

Though not necessary to their conclusion that Milligan's discharge was required, these Justices expressed their belief that, contrary to the majority's view, Congress could have authorized that military commissions be held in Indiana. *Id.* at 138. However, even this view of congressional power was closely cabined. *See id.* at 140 ("We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists."). Moreover, there was no dispute that the military could not hold or try Milligan in the absence of congressional authorization. The majority and the concurring Justices were thus in

As part of its forceful rejection of military jurisdiction over civilians – even those accused of violating the law of war – the Court also found that Milligan's trial by military commission violated his right to trial by jury, *id.* at 122, a right that is "not held by sufferance, and cannot be frittered away on any plea of state or political necessity." *Id.* at 123. In the majority's view, even the suspension of the writ of habeas corpus did not allow the President or Congress to disturb this constitutionally enshrined safeguard of liberty. *Id.* at 125-126.

Although the Civil War threatened the country's very existence, the Court concluded that wartime anxieties did not justify abandonment of basic constitutional values:

> Th[e Framers] foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law.... The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

Id. at 120-21.

The Court was mindful of the grave threat that Milligan posed during a time when the nation was being torn

agreement that the President had no inherent authority as Commander in Chief to authorize Milligan's detention by military authorities.

apart by war, characterizing his conspiracy to "introduce the enemies of the country into peaceful communities" and overthrow the government as an "*enormous crime*" that warranted the law's heaviest penalties. *Id.* at 130. The Court nonetheless found the government's accusations insufficient to justify departure from constitutional precepts. In a manner that responds as forcefully today to the government's claim for detaining Padilla, the *Milligan* Court explained:

> If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he "conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection," the *law* said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

Id. at 122; *see id.* at 127 ("It is difficult to see how the *safety* for the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them.").

In refusing to cede dominion to the military, *Milligan* both affirmed a fundamental constitutional principle and reflected precedent. *See id.* at 128-29 (discussing history and case law supporting the Court's ruling and observing that military arrests and trials during wartime "were uniformly condemned as illegal" by the courts when "our officers made arbitrary arrests and, by military tribunals, tried citizens who were not in the military service"). Neither the passage of

time nor subsequent decisions have diminished *Milligan*'s holding. *See infra* Section C. It applies as forcefully today as it did for an unprecedented civil war that took more than 600,000 lives.

B. *Quirin* Does Not Sanction the President's Unilateral Imposition of Military Detention in Padilla's Case

In an effort to avoid the dictates of *Milligan*, Petitioner relies almost entirely on *Ex parte Quirin*, 317 U.S. 1 (1942), to support his claim of essentially unreviewable authority to detain Padilla indefinitely without charges or trial. Fairly read, *Quirin* does not go nearly that far.

Quirin involved the military trial of World War II combatants who secretly entered the United States with plans to sabotage military installations. After coming ashore from German submarines, they buried their uniforms and explosives and slipped into the night. They were quickly arrested after one of the would-be saboteurs, with the support of a second, informed the FBI of the group's plot and helped the authorities locate the others. *See* David J. Danelski, *The Saboteurs' Case*, 1 J. Sup. Ct. Hist. 61, 64-65 (1996).

In short order, the men were charged with violations of the law of war and the Articles of War for having discarded their uniforms and crossed enemy lines in civilian dress to engage in sabotage, for giving intelligence to the enemy, for spying, and for conspiracy to commit these offenses. They were tried secretly before a military commission, which found them guilty and imposed sentences of death. In a habeas corpus petition, the saboteurs challenged the military commission's authority to try them. *Ex parte Quirin*, 317 U.S. at 19.

This Court heard arguments in a special session, with the parties filing their briefs the day argument began. Less

than twenty-four hours after the close of arguments, the Court issued a *per curiam* decision upholding the jurisdiction of the military commission. *Ex parte Quirin*, 317 U.S. 1, 18-19, 63 S. Ct. 1 (1942) (providing text of *per curiam* opinion); *see* Danelski, *supra*, at 61. The Court's opinion justifying its decision, 317 U.S. 1, 63 S. Ct. 2 (1942), proved harder to formulate and, by the time it was finally released, six of the saboteurs had already been executed. *See* Danelski, *supra*, at 61. Chief Justice Stone spent more than six weeks drafting the full opinion, a task he described as "'a mortification of the flesh.'" *Id.* at 72 (citation omitted).

Quirin has been much criticized, in part for the circumstances surrounding the Court's decisionmaking process.[7] Most remarkably, perhaps, President Roosevelt had let it be known that he was prepared, if necessary, to execute the saboteurs despite any action taken by the Court. *See* Danelski, *supra*, at 68, 69; Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 Cal. L. Rev. 3, 30-31 & n.150 (2003); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259, 1291 & n.118 (2002); *see also* Danelski, *supra*, at 61, 66, 69 (documenting additional problematic aspects of *Quirin*'s adjudication).

[7] *See, e.g.*, Danelski, *supra*; Louis Fisher, *Military Tribunals: The Quirin Precedent* (Mar. 26, 2002) (Cong. Research Serv. Report); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259, 1290-91 (2002); Michael R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 Mil. L. Rev. 59, 83 (1980).

Justice Frankfurter subsequently described *Quirin* as "not a happy precedent," and Justice Douglas stated: "'Our experience with [the Saboteurs' Case] indicated . . . to all of us that it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds . . . is made, sometimes those grounds crumble.'" Danelski, *supra*, at 80 (citations omitted).

Even absent these circumstances that undermine the strength of *Quirin* as precedent, it is readily distinguishable from this case on numerous grounds.

First, *Quirin*'s holding is confined to enemy combatants who are bound by the law of war and subject to military punishment when they violate its rules. Padilla, however, is not a combatant under the law of war. Accordingly, he must be treated as a civilian and cannot be subject to indefinite military detention. The reasoning of *Quirin* simply does not extend to these facts.

The *Quirin* saboteurs were part of the German armed forces while Germany and the United States were at war. Under the law of war, they were subject to the privileges and responsibilities of "combatants." They were therefore entitled to use lethal force against military targets and, if captured, to be treated as prisoners of war as long as their belligerent conduct comported with the law of war. When they changed out of uniform to engage in clandestine operations behind U.S. military lines, they violated the law of war and lost their privileged status as "lawful combatants," allowing the government to try them before a military tribunal. Had they not shed their uniforms, they would have been entitled to be treated as prisoners of war.[8]

[8] The absence of uniform was "essential" to the definition of the offense in *Quirin* only because the combatants were bound to wear one in the first instance. 317 U.S. at 38; *see id.* at 37; *id.* at 35 n.12 (noting that certain acts are "war crimes" when committed in civilian dress behind enemy lines but that "authorities are unanimous in stating that a soldier in uniform who commits [such acts] would be entitled to treatment as a prisoner of war; it is the absence of uniform that renders the offender liable to trial for violation of the laws of war"). Thus, the violation of the law of war was complete in *Quirin* when the saboteurs crossed enemy lines and changed out of military uniform into civilian dress. It did not matter that they never carried out their plot. But surely the government is not claiming that Padilla's offense was having returned to the United States on a commercial flight and landed in civilian clothes.

In an effort to sustain the only possible justification for Padilla's military detention, the government is compelled to claim that Padilla is a combatant, like the *Quirin* saboteurs. But in making that claim, it has not offered any definition of the term that would provide a limiting principle,[9] and it disregards the definition provided by international law. Specifically, a 1977 Protocol to the Geneva Conventions defines "combatants" as "[m]embers of the armed forces of a Party to a conflict . . . [who] have the right to participate directly in hostilities." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 43(2).[10] Individuals who meet the requirements for combatant status have a qualified right to direct violence against other combatants. If, for example, the *Quirin* petitioners had remained in uniform and fired at

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[9] The fact that criminal defendants in other cases have reportedly been threatened with the "enemy combatant" designation demonstrates both how loosely the term may be defined and the danger of vesting the Executive with such unilateral authority. *See, e.g.*, Dan Herbeck, *2 Defendants Feel Pressure for Plea Deals*, Buff. News, Apr. 6, 2003, at B1. The looming threat of designation can itself inhibit suspects and defendants (and their counsel) from vigorously asserting their constitutional rights as criminal defendants for fear that an aggressive defense may trigger an "enemy combatant" designation and the consequent indefinite detention at issue here. The power claimed by Petitioner thus has significance far beyond the confines of this particular case.

[10] The United States chose not to ratify Protocol I, *see* Ronald Reagan, Letter of Transmittal, Treaty Doc. No. 100-2, 100th Cong., 1st Sess., (1987), *reprinted in* 26 I.L.M. 561 (1987), but that fact does not diminish the relevance of this definition as a guiding principle, especially in light of Petitioner's failure to suggest any other limit on the Executive's claim of apparently boundless discretion to designate "enemy combatants" and replace civilian justice with unreviewable military detention. Furthermore, the United States has recognized that most of the provisions of Protocol I are binding on the United States as customary international law. *See, e.g.* Dep't of the Army, *Operational Law Handbook* 11 (Col. Tia Johnson ed., 2003).

American military personnel after landing in the United States, they would not have violated the law of war and could not have been prosecuted.

The government has alleged that Padilla is "associated" with Al Qaeda, but that allegation (even aside from its vagueness), is not sufficient by itself to establish Padilla as a combatant.[11] Nothing in the public record suggests that Padilla was acting on behalf of any entity that would be recognized as a party to an international armed conflict under the Geneva Conventions, or that Al Qaeda as an organization enforces compliance with the laws of war, two necessary elements of the combatant definition. *See id.* art. 43(1).[12]

The difference between Padilla and the German saboteurs is highlighted by the fact that the *Quirin* petitioners, had they been detected as they landed in uniform, could have been shot on sight. *See* Cyrus Bernstein, *The Saboteur Trial: A Case History*, 11 Geo. Wash. L. Rev. 131, 175 (1943) (describing point in *Quirin* argument when "Justice Jackson observed that if the saboteurs had been shot while landing there would not have been murder. Colonel Royall [representing the petitioners] agreed . . . . "); *see also* Michael Belknap, *Frankfurter and the Nazi Saboteurs*, 1982 Y.B. 65, 69 (reprinting "F.F.'s Soliloquy," a controversial plea for patriotism, in which Justice Frankfurter maintained, *inter alia*, that the saboteurs were "damned scoundrels," "just low-down, ordinary, enemy spies who, as enemy soldiers, have invaded our country and therefore could immediately

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[11] President Reagan explained his unwillingness to submit Protocol I to the Senate for its advice and consent by noting, *inter alia*, that he did not believe terrorists should be granted combatant status. 26 I.L.M. at 561; *see also id.* at 564 (expressing similar views of the State, Defense, and Justice Departments).

[12] For a fuller discussion of the applicable international law rules, see generally the Brief *Amici Curiae* of the Practitioners and Specialists in the International Law of War.

have been shot by the military when caught in the act of invasion").

We do not understand the government to be claiming that it was entitled to shoot Padilla as he deplaned at O'Hare. Because he is not a combatant, Padilla must be treated as a civilian. "There is no intermediate status." *See* Int'l Comm. of the Red Cross, *Commentary to the IV Geneva Convention* 51 (Jean S. Pictet ed., 1958); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 4(1) & 4(3), 6 U.S.T. 3516, 75 U.N.T.S. 287 (1956); Protocol I art. 50.

In *Quirin*, the government emphasized the distinction between soldiers and civilians to justify its assertion of military jurisdiction, and to distinguish *Milligan*. *See, e.g.*, Brief for Respondent at 10, *Ex parte Quirin*, 317 U.S. 1 (1942) ("Milligan never wore the uniform of the armed forces at war with the United States. The petitioners did."). Now, it prefers to obscure that distinction although it was critical to the *Quirin* Court's decision. 317 U.S. at 45. A trial might reveal that Padilla conspired to commit abhorrent acts. But that is a matter for the criminal justice system to resolve, not for the President to declare by designating Padilla an "enemy combatant." Notably, those who were thought to have aided the *Quirin* saboteurs, but who were not part of the German military, were prosecuted in the civil courts. *United States v. Leiner*, 143 F.2d 298 (2d Cir. 1944); *United States v. Cramer*, 137 F.2d 888 (2d Cir. 1943), *rev'd*, 325 U.S. 1 (1945); *United States v. Haupt*, 136 F.2d 661 (7th Cir. 1943).

Similarly, in describing Milligan, this Court observed:

> [H]e was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?

71 U.S. at 131.[13] Those observations apply with equal force to Padilla. To ignore the striking similarity between Padilla and Milligan as well as the crucial differences between them and those fighting for the German armed forces would undermine the limited nature of the *Quirin* decision. *See infra* at 22.

Second, while overlooking the narrow scope of *Quirin*'s actual holding, the government purports to glean from that decision a presidential power that the Court never found. As other *amici* address in greater detail, *Quirin*'s approval of a military trial for enemy combatants charged with violations of the law of war rested on congressional authorization for such trials. *Quirin*, 317 U.S. at 25-30; *see also In re Yamashita*, 327 U.S. 1, 7 (1946) (describing *Quirin* as involving lengthy consideration of acts of Congress creating military commissions). *Quirin*'s explicit statement that it was *not* "determin[ing] to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation," 317 U.S. at 29, dispels any notion that the decision recognizes the inherent power now claimed by the Executive to impose military detention on an American citizen seized on American soil. That claim was reached in *Milligan*, and it was forcefully rejected. 71 U.S. at 121.[14]

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[13] *See* Hale, *supra*, at 40-41 ("[Martial law] was only to extend to Members of the Army, and never was so much indulged as intended to be executed or exercised upon others; for others who were not listed under the Army had no Colour of Reason to be bound by Military Constitutions, applicable only to the Army; whereof they were not Parts, but they were to be order'd and govern'd according to the Laws to which they were subject, though it were a Time of War.").

[14] In this regard, both *Quirin* and *Milligan* accord with a long line of cases holding that the President's wartime authority is closely cabined by congressional authorization for his acts. *See, e.g.*, *Youngstown Sheet*

Third, *Quirin* was decided on the basis of *stipulated* facts establishing that the petitioners were German combatants engaged in unlawful belligerency. 317 U.S. at 20, 36. In this case, by contrast, there is no stipulation and the facts alleged by the government have never been tested.[15] The absence of stipulated facts is important because, as the *Quirin* Court recognized, "there are acts regarded . . . as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by jury." 317 U.S. at 29.

Fourth, the *Quirin* petitioners were at least *tried* for their violations of the law of war. *Cf. Yamashita*, 327 U.S. at 9 ("[W]e held in *Ex parte Quirin* . . . that Congress by sanctioning trials of enemy aliens by military commission for

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& Tube Co. v. Sawyer, 343 U.S. 579 (1952); *The Paquete Habana*, 175 U.S. 677 (1900); *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814).

[15] As if to suggest that the Court should trust that enough care has been taken, the government writes extensively of the layers of internal review that, it now claims, preceded the designation of Padilla as an enemy combatant. Pet. Br. at 6-7, 27. However thorough that internal process may have been, the salient fact is that it was conducted entirely by and within the Executive Branch. It therefore cannot be viewed as a constitutionally adequate substitute for independent and meaningful judicial review. Habeas courts have long subjected military detentions to close scrutiny of the factual and legal bases for confinement. *Givens v. Zerbst*, 255 U.S. 11, 19 (1921); *McClaughry v. Deming*, 186 U.S. 49, 62-63 (1902); *In re Territo*, 156 F.2d 142, 143-45 (9th Cir. 1946) (upholding petitioner's detention only after district court held a hearing and found facts establishing Territo's prisoner-of-war status); *United States ex rel. Zdunic v. Uhl*, 137 F.2d 858, 859-60 (2d Cir. 1943) (reviewing whether relator was a "native, citizen, denizen, or subject" of Germany, and thus subject to detention as an "alien enemy"); *Ex parte Toscano*, 208 F. 938, 943-44 (S.D. Cal. 1913) (allowing petitioners' temporary detention as foreign belligerents only upon determining that, on the stipulated facts, international law essentially required it); *see also Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778) (reviewing impressment of sailor into British Navy despite King's claim that ships were "short of men").

offenses against the law of war had recognized the right of the accused to make a defense."). Consequently, the only question before the *Quirin* Court was whether "the detention of petitioners . . . *for trial* by Military Commission . . . on charges preferred against them purporting to set out their violations of the law of war and of the Articles of War, is in conformity to the laws and Constitution of the United States." 317 U.S. at 18-19 (emphasis added); *id.* at 46 ("We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission."). Padilla, on the other hand, is being held by military officials without charges or trial.[16]

In passing on the legality of trying combatants for a particular violation of the law of war, the *Quirin* Court observed that "[l]awful combatants are subject to capture and detention *as prisoners of war*." *Id.* at 31 (emphasis added). Unlawful combatants, the Court continued, in addition to such capture and detention in accordance with international law, can be "subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." *Id.* Resting virtually its entire case for Padilla's detention on these two sentences, the government argues that the power to try the *Quirin* petitioners by military commission necessarily implies the authority to detain Padilla indefinitely even without charges or trial. Putting aside the government's failure to comply with international legal requirements governing the detention of combatants,[17] Petitioner's

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[16] As an American citizen, Padilla is expressly ineligible for trial by military commission under the President's Order establishing the commissions. Presidential Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001); *see also* 32 C.F.R. § 9.1 *et seq.* (establishing procedures for "Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism").

[17] The United States is a signatory to the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T.

argument collapses if Padilla is not a combatant in the first instance. *See supra* at 16. More fundamentally, it is simply not the case that the power to detain someone without process is a less severe intrusion on liberty than the power to punish someone after process has been afforded. Otherwise, a criminal trial would be unnecessary whenever an individual stands accused of an offense.

All of these differences between Padilla and the *Quirin* petitioners have important constitutional ramifications. Since the Magna Carta, due process has been understood to mean that "[n]o free man shall be taken or imprisoned . . . or in any way destroyed . . . except by the legal judgment of his peers or by the law of the land." Magna Carta art. 39 (1215), *reprinted in Sources of our Liberties* 17 (Richard L. Perry ed., 1959). The government treats as an inconvenience safeguards that the Framers regarded as essential, including the right to indictment and trial by jury. *See generally Chambers v. Florida*, 309 U.S. 227, 236-37 (1940).

Contrary to Petitioner's expansive reading of *Quirin*, the opinion carefully reflects the limitations articulated by Justice Black in a memorandum to Chief Justice Stone:

> In this case I want to go no further than to declare that these particular defendants are subject to the jurisdiction of a military tribunal because of the circumstances and purposes of their entry into this country as part of the enemy's war forces. Such a limitation, it seems to me, would leave the *Milligan* doctrine untouched, but to subject every person in the United States to trial by military tribunals for every violation of every rule of war which has been or may hereafter be adopted . . . might go far to destroy the protections declared by the *Milligan* case.

Danelski, *supra*, at 76 (citation omitted). As Chief Justice Stone explained for the majority: "We hold only that *those particular acts* constitute an offense against the law of war which the Constitution authorizes to be tried by military commission." 317 U.S. at 46 (emphasis added).

Quirin thus carved out a limited sphere in which the military was allowed to try admitted combatants for specific, stipulated violations of the law of war. To use *Quirin* to justify the detention in this case would in effect rewrite that decision. It would also fatally undermine *Milligan*, a precedent that has for nearly 150 years stood as a bulwark between our constitutional democracy and the nation we would be if the Executive were indeed vested with the unchecked power it seeks here.

C. *Milligan's* Holding Has Been Frequently Reaffirmed Since *Quirin*

By minimizing the significance of *Milligan* and misinterpreting the relevance of *Quirin*, Petitioner has misplaced both decisions in our constitutional history. *Quirin* is easily confined to its facts, and its holding has never been extended by this Court. *Milligan*, by contrast, is rooted in principles that predate our nation's founding and that have continued to flourish. Indeed, fifteen years after it decided *Quirin*, the Court characterized *Milligan* as "one of the great landmarks in this Court's history." *Reid v. Covert*, 354 U.S. 1, 30 (1957).

3316, 3322, 75 U.N.T.S. 135, 140 (1956). If Padilla is not a civilian, he must be treated in accordance with the provisions of the Convention. Article 5 of that Convention requires that lawful combatants be treated as prisoners of war. If there is any doubt as to whether a combatant is lawful or unlawful, the individual is to be afforded the protections of the Convention until his or her status is determined by a competent tribunal. *Id.* art. 5.

Consistent with the Framer's strong opposition to military usurpation of civilian rule, the Court in modern times has repeatedly confined military jurisdiction within narrow limits. Thus, in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), the Court rejected the government's claim that the Hawaiian Organic Act, which allowed suspension of the writ of habeas corpus and imposition of martial law, gave "the armed forces power to supplant all civilian laws and to substitute military for judicial trials. . . ." *Id.* at 313. As a consequence, the Court ordered the release of the two petitioners, who had been tried by military tribunals in Hawaii following the attack on Pearl Harbor.[18] The act at issue had been "intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the island," *id.* at 324, but its language and legislative history did not clearly address whether the military could substitute its own jurisdiction for that of the courts. *Id.* at 315-19. The Court, however, found the "answer . . . in the birth, development and growth of our governmental institutions." *Id.* at 319. Given the principles and historic practices of the nation, the Court ruled that the Act could not be interpreted as allowing the military to subjugate civilian authority and bypass the courts.

Sharp limitations on military authority continued in *Toth v. Quarles*, 350 U.S. 11 (1955), where the Court held that Congress cannot subject an ex-soldier to military jurisdiction, even for an offense committed while in service. The Court observed:

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[18] At the time of one petitioner's prosecution, the courts were barred from conducting criminal trials by order of the military. 327 U.S. at 308-09. In the case of Duncan, the courts had been allowed to return to their normal functions, but he was nonetheless tried before a military tribunal for having violated a military order "which prohibited assault on military or naval personnel with intent to resist or hinder them in the discharge of their duty." *Id.* at 310-11.

> There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.

Id. at 22.

The Court in *Reid v. Covert* again declined to depart from the constitutionally enshrined tradition that military power be subservient to civilian authority. 354 U.S. at 40. Building on *Milligan*, *Duncan*, and *Toth*, the Court held that, even in the case of service members' dependents living on military bases, Congress lacked power under the Constitution to subject civilians to military trial. The Court emphasized that civilian courts, operating in accordance with Article III and the Fifth, Sixth, and Eighth Amendments, are "the normal repositories of power to try persons charged with crimes," whereas "the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction." *Id.* at 21; *see also Toth*, 350 U.S. at 15-17, 22-23 & n.23 (linking the importance of preventing military encroachment to the preservation of the right to trial by jury and related constitutional protections). Recognizing that "[e]very extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections," *Reid*, 354 U.S. at 21, the Court held fast to the nation's "deeply rooted and ancient opposition in this country to the extension of military control over civilians." *Id.* at 33

This long history of carefully repelling military encroachment upon the supremacy of civilian authority and the rule of law makes clear that neither the President nor

Congress can impose the detention to which Padilla has been subject. If civilians cannot be subject to military trial, they surely cannot be subject to military detention without trial. The Executive nonetheless claims that its decision to hold Padilla in military custody without charges or trial should be upheld because terrorism presents a threat unlike any other our nation has previously encountered. What is lacking in precedent, it suggests, is made up for by exigency, in essence echoing its decades-past argument that the rule of *Milligan* was "distinctly unsuited to modern warfare conditions where all of the territories of a warring nation may be in combat zones or imminently threatened with long-range attack even while civil courts are operating." *Duncan*, 327 U.S. at 329 (Murphy, J., concurring).

To this, Justice Murphy responded:

> The argument thus advanced is as untenable today as it was when cast in the language of the Plantagenets, the Tudors and the Stuarts. It is a rank appeal to abandon the fate of all our liberties to the reasonableness of the judgment of those who are trained primarily for war. It seeks to justify military usurpation of civilian authority to punish crime without regard to the potency of the Bill of Rights. It deserves repudiation.
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> . . .
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> From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised.

Id. at 329-30; *see Reid*, 354 U.S. at 14 ("The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government."); *Milligan*, 71 U.S. at 120-21.

D. The Executive's Use of the Term "War" Does Not Resolve the Constitutionality of Padilla's Detention

This case raises fundamental questions concerning the meaning of "war" in an age of terrorism and the scope of the President's power to combat what no one denies is a very real threat to the United States and the security of its people. The security of our people, however, depends not only on defending our borders but also on defending the constitutional principles that define us as a nation.

Not even the government contends that the current struggle against terrorism fits within the definition of a traditional war. Yet, it selectively seeks to invoke the rules of traditional warfare to justify its actions in this case. Even under that framework, the government has overstepped its bounds, as demonstrated above. There are, however, important differences between the "war" on terrorism and a traditional war that must be carefully considered in determining the appropriate constitutional rules to apply to these facts.

Ignoring those differences, the government argues that the detention of "enemy combatants" is always indefinite because one can never be sure when a war will be over. That statement is correct, but misleading. While we could not have predicted in 1942 that World War II would end three years later, we could anticipate that the war would be concluded by either a surrender or a negotiated settlement

and that both sides' prisoners of war would be repatriated at the war's end.

Even putting aside the critical fact that Padilla is not being treated as a prisoner of war, it is hard to imagine that the threat posed by global terrorism will ever be resolved by a negotiated resolution. Indeed, the government itself has candidly acknowledged as much. *See* Brief for Respondent at 16, *Hamdi v. Rumsfeld*, *cert. granted*, 124 S. Ct. 981 (2004) (No. 03-6696). As a result, there are simply *no* rules constraining the government's claimed power. It alone gets to decide who is an "enemy combatant." It alone gets to decide when, if ever, the "war" on terrorism is over. And, assuming the "war" is still ongoing, it alone gets to decide whether individuals detained without due process can safely be released. Under Petitioner's view, Congress has no role to play in the process, and the role of the courts is marginal at best.

In a system of divided government, this is an extraordinary and unprecedented assertion of executive power. Predictably, it has already led to seemingly arbitrary results. The government has never explained why Zaccarias Moussaoui is being criminally prosecuted, Jose Padilla is not, and Ali Saleh Kahlah al-Marri was initially prosecuted criminally and then abruptly transferred to military jurisdiction, although all three are alleged to have been "associated" with Al Qaeda. Similarly, the government has never explained why John Walker Lindh was criminally prosecuted and Yaser Hamdi was not, although both are alleged to have fought with the Taliban.

Our system of checks and balances was designed to ensure that individual liberty does not rest on the good faith of government officials, and to place limits on the exercise of government authority. By contrast, the assertion of power by the Executive in this case is virtually boundless. Padilla was arrested at O'Hare by law enforcement agents. He has now

been detained by the military for twenty-two months on the theory that he is an enemy soldier captured on the battlefield. Fundamental rights can and should depend on more than the manipulation of labels.

Both before and after September 11th, the government has indicted and convicted numerous alleged terrorists in the criminal justice system. Its contention that it will lose the opportunity to interrogate Padilla for intelligence purposes if he is indicted does not distinguish Padilla's situation from any of those other cases. Nor, for that matter, does it distinguish Padilla from other cases where a criminal defendant may possess important intelligence information, such as espionage prosecutions.

This case does not involve the deployment of American forces overseas. It does not involve someone captured abroad while engaged in direct hostilities against our military forces. It does not involve someone whose activities could be privileged under the law of war if performed in uniform. It does not involve someone who is beyond the reach of the American criminal justice system.

If the government believes that Padilla was plotting to engage in terrorist acts, the criminal courts remain open and functioning and perfectly capable of adjudicating his guilt. Under *Milligan*, that is where his case belongs. That is all this Court is being asked to decide.

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

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